IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

1.Rameshwar & anr. Vs. Hakim Mohd. Ibadullh Khan

(S.B CIVIL FIRST APPEAL No.101/1986)

2.Hakim Mohd. Ibadullh Khan Vs. Rameshwar & anr.

S.B. CIVIL FIRST APPEAL No.7/1987 against the judgment & decree dated 30.6.1986 passed by the District Judge, Tonk in Civil Suit No.28/1981.

Date of Judgment :: August 30, 2006

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. S. Kasliwal with Mr. Ram Naresh Vijay
& Ms. Garima Dadhich for the appellants.
Mr. Syed Manzoor Ali)
Ms. Anita Khandelwal) for the respondent.
(In Civil First Appeal No.101/1986)

Mr. Syed Manzoor Ali)
Ms. Anita Khandelwal)for the appellant.
Mr. S. Kasliwal with Mr. Ram Naresh Vijay
& Ms. Garima Dadhich for the respondents.
(In Civil First Appeal No.7/1987)

BY THE COURT:

1. This appeal is directed against the judgment dated 30.6.1986 of learned District Judge, Tonk whereby the learned trial court decreed the Civil Suit No.28/1981 but instead of granting specific performance for sale of immovable property in question, the learned trial court awarded damages and refund of advance already paid by the plaintiff for purchase of immovable property from the

defendant.

2. Being aggrieved by the said judgment the plaintiff has approached this Court in the present first appeal U/s.96 of CPC and the cross appeal No.7/87 has been filed by the defendant against the award of damages of Rs.10,000/-.

3. Facts put briefly, are that the plaintiff Rameshwar agreed to purchase two shops with first floor 'Balakhana' situated at Subhash Bazar, Tonk from defendant No.1 Hakim Mohd. Ibadullh Khan for a sum of Rs.38,000/- and paid an advance of Rs.5,000/- to the defendant No.1. An agreement to sell was executed by the defendant No.1 which is Ex.8 on record wherein it was stipulated that within one month of the execution of the said agreement i.e. before 17.11.1978 the plaintiff would pay the balance amount of Rs.33,000/- and get the sale deed executed and registered. The case of the plaintiff is that he gave the registered notice to the defendant on 10.11.1978 and offered to pay the balance amount of Rs.33,000/- and requested him to get the said sale deed executed in pursuance of the agreement. However, the defendant did not give any reply to the said notice but instead sent a copy of reply from his side to defendant No.2 Banna son of Nannu Kunjra from the side of Shri Gopal Raj Singhvi, Advocate in which defendant No.1

referred to some earlier agreement to sell one of the shops to the defendant No.2 for a sum of Rs.20,000/- against which an advance of Rs.5,000/- was received by him but since the defendant No.2 failed to pay the balance amount and get the sale deed executed and he only brought the plaintiff Rameshwar to purchase both the shops with first floor Balakhana for the sum of Rs.38,000/- against which the advance of Rs.5,000/- was received from him and, therefore, defendant No.1 in the said reply Ex.1 said that both the parties may come together and pay the balance amount and he is ready to execute the sale deed in favour of either of the parties. The said reply dated 8.11.1978 was endorsed to the plaintiff also. According to plaintiff the plaintiff gave another notice on 18.11.1978, Ex.2 in which he reiterated his readiness and willingness to pay the balance amount of Rs.33,000/- and he had even taken cash of Rs.33,000/- on 17.11.1978 to the residence of defendant No.1 and waited there for hours but the defendant refused to execute the sale deed. The plaintiff reiterated his continued readiness and willingness to perform his part of the contract.

4. That thereafter the plaintiff filed the present suit seeking specific performance from the defendant No.1 and the said suit was filed on 2.9.1981 within the limitation of three years.

5. The learned trial court framed the following issues on 15.7.1983:-

(i)Whether there was an agreement between the defendants on 14.6.77 to sell one northern shop and half of Balakhana for a sum of Rs.20,000/- and whether the defendant No.2 had given an advance of Rs.5,000/- to defendant No.1 and obtained possession of the said portion of property (defendant)?

(ii)Whether on account of non-performance of his part of agreement dated 14.6.77 the advance given by defendant No.2 stood forfeited?

(iii)Whether the defendant No.2 in order to save his advance got the agreement to sell executed in favour of plaintiff on 14.10.78 by the defendant No.1 and an advance of Rs.5,000/- given under agreement dated 14.6.77 was received by him?

(iv)Whether in view of objection No.14 of defendant No.1 and special plea No.B of defendant No.2 the plaintiff in the agreement dated 14.10.78 agreed

to the sale of northern shop including half Balakhana in favour of defendant No.2 for the sum of Rs.23,000/- by the defendant No.1 and agreed to get the southern shop for the sum of Rs.15,000/- in his own favour?

(v)Whether the agreement of plaintiff is not with free consent and whether it is illegal and unjustified?

(vi) Whether on account of conduct and latches the plaintiff can be deemed to have waived his right under the agreement?

(vii) Relief.

6. The learned trial court decided all the issues in favour of plaintiff as would be evident from the findings given in the impugned judgment and decree including the issue No.6 regarding the delay and latches and the requirement to get the sale deed executed before 17.11.1978 i.e. one month of the agreement Ex.8 dated 17.10.1978. However, the learned trial court on the ground of principles of natural justice instead of granting decree for specific performance awarded damages of Rs.10,000/- and refund of Rs.5,000/- advance paid by the plaintiff merely on the ground that by that time the

prices of the property in question might have become 4 to 5 times. The learned trial court held so even though the learned trial court found while deciding the earlier issues including the issue Nos.1 and 4 that the agreement between the defendant No.1 and defendant No.2 for sale of northern side of shop was not proved whereas the agreement to sell Ex.8 executed by the defendant No.1 in favour of plaintiff Rameshwar was duly proved and the learned trial court also gave the finding that the plaintiff was always ready and willing to perform his part of the contract on the basis of notices given by the plaintiff offering to pay the balance amount of Rs.33,000/- yet the learned trial court, perhaps merely swayed by the increase in the prices of property, refused to grant decree for specific performance and that is the only reason given in the impugned judgment.

7. This Court having considered the rival submissions and upon perusal of the impugned judgment and relevant record, is of the clear opinion that the failure to exercise discretion by the learned trial court to grant decree of specific performance in the present case was wrong and unjustified and no such principles of natural justice as stated by the learned trial court in the impugned judgment, could come in the way of plaintiff being granted such decree.

8. Mr. Ram Naresh Vijay arguing for the appellant plaintiff vehemently submitted that in view of clear and binding precedents of the Hon'ble Apex Court in **Mademsetty Satyanarayana Vs. G. Yelloji Rao and others** [AIR 1965 SC 1405]; **Dr. Jiwan Lal & others Vs. Brij Mohan Mehra & another** [AIR 1973 SC 559]; **Continental Construction Co. Ltd. Vs. State of Madhya Pradesh** [(1988) 3 SCC 82]; and, **P.C. Varghese Vs. Devaki Amma Balambika Devi & others** [(2005) 8 SCC 486], the mere delay in execution of the sale deed and increase of prices of the property in the meanwhile was not at all a good ground to refuse the decree of specific performance and, therefore, the judgment of the learned trial court on this ground deserves to be reversed.

9. Mr. Syed Manzoor Ali, learned counsel appearing for the defendant No.1 and Ms. Anita Khandelwal appearing for defendant No.2 could hardly oppose this legal position. Mr. S.M. Ali only submitted that though his client has filed cross appeal No.7/87 against the award of damages of Rs.10,000/- but he was contesting the main appeal only of the plaintiff on the ground that it was discretion of the learned trial court to refuse the decree of specific performance and instead of that, award the compensation and refund of advance and, therefore, the said decree did not call for any interference. He relied upon the

judgment of this Court in **Santa Singh Vs. Darbara Singh** [1986 RLW 498]. The facts of the said case are clearly distinguishable and not applicable in the present facts because in that case the notice for execution itself was given by the plaintiff after five years of the agreement and the suit was filed thereafter and the court held that the period of limitation starts on the date of execution of the agreement and since the suit was filed after the expiry of said limitation no specific performance could be granted. Here in the present case the plaintiff has not only filed suit within limitation but had constantly given notices and shown his readiness and willingness to perform his part of the contract and the findings of all issues being in favour of plaintiff, refusal to grant decree for specific performance in the fag end of the judgment by the learned trial court cannot be countenanced.

10. The time elapsing in the litigation in such cases of specific performance is bound to give rise to these kinds of considerations and prices of properties are bound to increase in all towns and cities for a variety of reasons. If the rights of plaintiff were to be defeated only on such considerations under the guise of principles of natural justice, then decree of specific performance cannot be granted in any case. But that is not the law and the law as expounded by the Hon'ble Apex Court in the

afore-noted citations is very clear and is contrary to the aforesaid proposition as taken by the learned trial court.

11. Consequently, this Court is of the clear opinion that the present appeal deserves to be allowed and the judgment under appeal of the learned trial court deserves to be set aside and decree of specific performance in favour of plaintiff deserves to be granted. The defendant No.1 is directed to execute the sale deed in favour of plaintiff on payment of the said sum of Rs.33,000/- and get the sale deed executed in his favour and in the absence of defendant failing to do so, the learned trial court shall execute such sale deed for the two shops and first floor Balakhana as specified in the suit. The defendant No.1 is given three months time to execute such sale deed and upon his failure to do so, the court shall do the same within the next three months.

12. In view of the present Appeal No.101/86 being allowed, connected Appeal No.7/87 is consequently disposed of in view of the judgment passed in the connected appeal. Thus, Appeal No.101/86 is allowed and the connected Appeal No.7/87 is disposed of in the light of the judgment in First Appeal No.101/1986. No order as to costs.

(Dr.VINEET KOTHARI),J.

VS/